In the Supreme Court of the United States

OCTOBER TERM 1967

No. 21

In the Matter of the Estate of
PAULINE SCHRADER, Deceased

OSWALD ZSCHERNIG, MINNA PABEL, OLGA HERTA WINCKLER, ALFRED KOESTER, JOHANNA BLASCHKE and HANS FUESSEL,

Appellants,

v.

WILLIAM J. MILLER, Administrator of the Estate of Pauline Schrader, Deceased, MARK O. HATFIELD, TOM McCALL and ROBERT W. STRAUB, respectively the Governor, Secretary of State and State Treasurer of Oregon, constituting the STATE LAND BOARD OF OREGON, and all persons unnamed or unknown having or claiming any interest in the Estate of Pauline Schrader, Deceased,

Appellees.

Appeal from the Supreme Court of the State of Oregon

APPELLANTS' REPLY BRIEF

[in response to Brief of Appellee State Land Board of Oregon, and Brief for the United States as Amicus Curiae]

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I. In Response to Brief of Appellee State Land Board of Oregon

Introduction

The Brief of Appellee State Land Board of Oregon, filed herein by the Attorney General of Oregon,

makes and presents argument on four points briefly summarized as follows:

1. That ORS 111.070, Oregon's reciprocal inheritance rights statute, is not an unconstitutional incursion by the state into the Federal Government's exclusive field of foreign affairs.

2. That the "Act of State" doctrine [most recently declared by this Court in *Sabbatino*, 376 U.S. 398] is not applicable to the issues of this case.

3. That the due process and equal protection clauses of the Fourteenth Amendment are not properly before this Court and that the non-resident alien heirs may not therefore claim any rights thereunder, and

4. That a substantial part of the 1923 treaty with Germany, including particularly Article IV relating to inheritance rights, has been expressly terminated, that therefore the ruling of the Oregon Supreme Court that the heirs were entitled to inherit the real (but not the personal) property of the estate was erroneous and that in fact the entire estate, real and personal, should have been escheated to the State of Oregon.

Most of the appellee's arguments under points 1 and 2 were anticipated in the Brief of Appellants and there is therefore no need for extensive reply thereto. Point 3 was heretofore answered in an earlier brief filed herein. Point 4 requires no reply because it is not before the Court in this appeal.

Point 1

ORS 111.070, the reciprocal inheritance rights statute, as construed and applied by the Oregon courts, is in fact a flagrant, unconstitutional incursion into the exclusive federal field of regulating the foreign affairs of the United States.

Appellee argues at length that the regulation of decedents' estates is traditionally a state rather than a federal function, citing *United States* v. *Burnison*, 339 U.S. 87 (1949) and earlier cases. *Burnison* had nothing to do with matters foreign, holding only that the Federal Government was not eligible to take by will under an applicable California statute. However, Appellee recognizes that this state power is not absolute, (Br. 8), that state statutes are subordinate to treaties or other indicia of overriding federal policy. But the premise goes farther than that. Such statutes also may not regulate in an area of international relations. As Mr. Justice Douglas put it in his dissent in *Ioannou* v. *New York*, 371 U.S. at 31:

> "Thus, if New York has, in effect, regulated an area of our international relations that should be regulated only by the Federal Government, or if the New York statute conflicts with existing federal policy, then that statute cannot be given effect."

We have pointed out that the Oregon Supreme Court stated the legislative purpose of the present statute's much milder, less demanding predecessor, § 61-107, O.C.L.A., as follows:

> "The purpose of § 61-107, O.C.L.A., is clear

> beyond doubt. It was enacted to assure reciprocal rights of inheritance to American citizens and alien residents or citizens. It was, in a sense, an inducement to foreign nations to so frame the inheritance laws of their respective countries in a manner which would insure to Oregonians the same opportunities to inherit and take personal property abroad that they enjoy in the state of Oregon. In re Estate of Krachler, supra (199 Or. at page 457)."

(*Clostermann* v. *Schmidt*, 215 Or. at 68)

This was in fact tantamount to the State of Oregon saying to foreign nations that if they do not conform their inheritance laws to Oregon's, their nationals would not be permitted to inherit in Oregon. On page 38 of appellants' brief is quoted the emergency clause to California's first reciprocity statute [Cal. Stats. 1941, ch. 895] which with amazing frankness stated the purpose of that statute to be to keep California inheritance funds from foreign nations who might use them "for the purposes of waging war that eventually may be directed against the Government of the United States." In essence, in fact almost verbally, most of Oregon's present § 111.070, enacted in 1951, here assailed, is the same as California's first reciprocity statute. Having thus in effect copied California's statute, it is, we submit, in order to ascribe the same legislative intent and purpose thereto. Clearly these are the concerns of the federal government acting for the nation as a whole, not of any individual state. They are not statutes "justified by any legitimate state

interest in regulating the local aspects of inheritance." Again quoting from *Ioannou* (371 U.S. at 34):

> "If New York's purpose is to preclude friendly governments from obtaining funds that will assist their efforts hostile to the Nation's interests, as *In re Getream's Estate*, 200 Misc. 543, 107 N.Y.S.2d 225, and *In re Renard's Estate*, 179 Misc. 885, 39 N.Y.S.2d 968, suggest, the complete prohibition of assignments made in those countries may have some basis in reason. But, if this is the purpose behind the statute, it seemingly is an attempt to regulate foreign affairs."

Appellee points at page 10 to the statement in the Solicitor General's Memorandum Brief (p. 5) that the State Department has advised "that State reciprocity laws, including that of Oregon, have had little effect on the foreign relations and policy of this country," and charge (at p. 9) that appellants have not demonstrated that the Oregon statute, and such reciprocity statutes generally, have had adverse effects on the foreign relations of the United States. True, there are not in this record the reactions of the men who sit in the consulates, in the embassies, in the foreign ministries, in the justice ministries, in the highest councils of the nations whose nationals' inheritances have been taken away, often confiscated, by American states, whose governments have been reviled, their officials maligned by American courts. It would, however, be denying the obvious, the self-evident, the undeniable, to contend that the reciproc-

ity statutes and the court decisions thereunder, some of which are reviewed on pages 18 to 53 of appellants' brief, have not had an adverse effect on the relations between the United States and the affected countries. It would be tantamount to contending that a man whose property has been forcibly taken from him, whose character has been sullied, whose integrity has been assailed, does not resent it, does not yearn for revenge, does not plan for retaliation when the opportunity offers.

If the State Department has as yet seen no more than "little effect" of the reciprocity laws on the foreign relations and policy of this country, this by no means negates our contentions. As shown on pages 14 and 55 of appellants' brief, there are as yet only about eleven states with reciprocity statutes, not all of those have the confiscatory provisions of Oregon's § 111.070, in only a few (primarily California and Montana) are the statutes so zealously invoked and enforced. However if Oregon's statute, the most demanding and drastic of them all, were given the stamp of constitutional validity by this Court, if it were in effect held that each of the fifty states of this union may lay down its own terms, conditions and demands upon foreign nations as the price for permitting their nationals to inherit, it is a certainty that there will ensue a great proliferation of such statutes, and their ever more zealous enforcement. Then retaliation from abroad will follow as the night the day.

Point 2.

The "Act of State" doctrine is indeed by analogy applicable to the issues of this case.

Appellee's statement of his point 2 fails to include the most important element. It appears on page 11 of his brief as follows:

> "2. The 'Act of State' doctrine is not applicable to the case of state determination and regulation of succession to or devolution of the property of domiciliary decedents."

In itself this statement is innocuous, perhaps not incorrect as far as it goes, but not pertinent to this case. To make it pertinent there would have to be added the words "to non-resident alien heirs or testamentary beneficiaries," whereupon the statement immediately becomes incorrect. As extensively demonstrated in appellants' brief, for an Oregon court to determine if a given foreign country (absent a treaty) meets each, and all, of the three requirements to make its nationals eligible to inherit in Oregon, it must examine, sit in judgment on, and then either recognize as adequate or reject as inadequate that country's constitution, laws, regulations, and decisions of its courts, the decisions and acts of its administrative agencies, *always as of the date, in fact the exact moment of the estate leaver's death,* in the following fields:

1. Of inheritance, to determine if American citizens have the right to inherit in the country

on the same terms and conditions as its own inhabitants and citizens.

2. Of foreign funds control and international remittance practices, to determine if an American citizen has the right to receive, i.e., to have remitted to him in the United States immediately and unrestrictedly, his inheritance from the country.

3. Of what happens, or would happen, to the foreign heir's inheritance money from an Oregon estate when it is remitted to him, to determine if the heir receives the "benefit, use or control" of it [whatever that may mean], and further determine if the foreign government is going to "confiscate" it, or any part of it, the Oregon court to adjudge if whatever happens to the money constitutes, in its eyes, "confiscation in whole or in part," by the government of the country.

Parenthetically it may be mentioned that the Oregon Supreme Court solved this latter problem very simply by holding, in *Pekarek's Estate*, 234 Or. 74 at 82, that the foreign country's inclusion in Treasury Department Circular No. 655 was "evidence that foreign beneficiaries would not receive their interests free from control amounting to, at least, a partial confiscation." [See. Br. of Applts. 33).

In some fourteen of the smaller of Oregon's thirty-six counties probate jurisdiction is still in the county courts, the judges of which need not be lawyers. In some twelve of the more populous counties

probate jurisdiction has in recent years been placed in the district courts which have limited jurisdiction, and in the rest in the circuit courts, which are courts of general jurisdiction. Perhaps even the county judges who are not lawyers could find the answers to these ramified and complex questions in respect to countries with well-organized governments and established jurisprudence, but what about countries, such as, for instance Saudi Arabia, South Korea, the newly emerging nations of Africa? It must be kept in mind that the statute places the burden of proof in respect to all three requirements upon the alien heir and if he fails to discharge the burden in any respect, perhaps through no fault of his, to the satisfaction of the probate judge, he loses his inheritance.

The point of all this is of course to show that by analogy the Act of State doctrine is applicable herein. Not only would the potential task of receiving evidence, examining and rendering decisions on the foreign law be overwhelming if not impossible, but there could not be any unanimity based on precedent because the law of any country could be different from day to day, even hour by hour or minute by minute. And only minor variations in the provisions or language of the reciprocity statutes from state to state would make even the decisions of the court of last resort in one state of little or no value in another state. Each decision would have its repercussion, good or bad, in the capital of the country involved, and would inevitably, persistently and perhaps not at all subtly, affect the relations between the United States and the country involved.

The courts of Oregon may not "sit in judgment" on the acts of another sovereign state, decide whether or not any particular act and each of a host of acts meets its approval, and, in the event of a negative conclusion, penalize an inhabitant or citizen of that country by disinheriting him, perhaps seizing his inheritance for itself by escheat. Clearly and most emphatically, all this is in the federal domain as every decision under a reciprocal inheritance rights statute, and particularly under ORS 111.070, in some significant degree affects the foreign relations of the United States. As pointed out by this Court in *Sabbatino*, 376 U.S. at 416, quoting from *Underhill* v. *Hernandez;* 168 U.S. 250 at 252, redress of grievances by reason of acts of a foreign state against our citizens, such as depriving them of rights of inheritance "must be obtained through the means open to be availed of by sovereign powers as between themselves," that is the diplomatic channels maintained by the executive department of the federal government. If legislation is needed or desired, it must be on the federal level speaking for the country as a whole. Any matter affecting the foreign relations of the United States falls, as does the Act of State doctrine, within the field of the federal common law.

Point 3

The due process and equal protection clauses of the Fourteenth Amendment are properly before the Court.

As pointed out on page 2 of Appellants' Brief in Opposition to Motion to Dismiss or Affirm, if a state

statute be held invalid because in violation of Article I, § 10, Article I, § 8, Article VI or any other provision of the federal Constitution, it results therefrom that property escheated under such a statute is being taken by the state without due process of law or compensation. However, the point is of little importance, since it has been amply demonstrated that ORS 111.-070 is an unconstitutional incursion by the state into the Federal Government's exclusive field of regulating the foreign affairs and relations of the United States.

Point 4

Whether a substantial part of the 1923 treaty with Germany, including particularly Article IV, has been terminated is not a question or issue in this appeal.

Nowhere in this appeal has this question been raised or heretofore mentioned. It is not among the questions set forth in the Notice of Appeal (R. 38-39), in the Jurisdictional Statement, in the Brief of Appellants or elsewhere. In fact at page 36 of the Brief of Appellants it is stated:

> "The Oregon Supreme Court's ruling that the 1954 treaty has no territorial application to the Soviet Zone is not being appealed here, nor the ruling that the 1923 treaty continues to have territorial application to the Soviet Zone of Germany."

The State Land Board did not cross-appeal on this issue and appellants therefore deem it needless, in fact not in order, for them to comment thereon. It

might be mentioned that the State Department's declarations in regard to the continued effectiveness of the 1923 treaty in the Soviet Zone, on which the Oregon Supreme Court based its ruling that the heirs were entitled to inherit the real property, were introduced into the case by the appellee State Land Board of Oregon by its Exhibits 15 and 16, not by the plaintiffs-appellants.

II. In Response to the Brief for the United States as Amicus Curiae

Appellants disagree with the statement on page 4 of the Solicitor General's brief, at the outset of his "Introduction and Summary of Argument," that

> "From the foregoing Statement, it is apparent that the disposition of this case will necessarily involve the interpretation of Article IV of the 1923 Treaty of Friendship, Commerce and Consular Rights."

It has already been shown by the above quotation from page 36 of the Brief of Appellants and otherwise that appellants did not appeal from the Oregon Supreme Court's rulings in respect to either the 1923 or the 1954 treaty. The Solicitor General appears determined to ask this Court to reconsider and reverse its interpretation of Article IV of the 1923 treaty in *Clark* v. *Allen* as it pertains to personal property and appends to his brief pages 39-67 of the government's brief in *Clark* v. *Allen*.

Here again, as in regard to Point 4 of the State Land Board's brief, appellants feel that they need not,

in fact that it would not be in order for them to respond to the Solicitor General's Brief for the United States as Amicus Curiae.

ADDITION TO BIBLIOGRAPHY

It was inadvertently omitted to include in the Bibliography on pages 68 and 69 of Brief of Appellants a Comment entitled "ESTATES: Soviet Citizens Can Inherit Under California Law—*Estate of Larkin*, (Cal. 1966)" [65 A.C. 49, 52 Cal. Rptr. 441, 416 P.2d 473] in the May 1967 California Law Review, Vol. 55, No. 2, p. 592. This is of particular interest because of the California Supreme Court's expressions of doubt on the constitutionality of the California reciprocity statute as quoted on pp. 44-46 of Brief of Appellants. Apparently this article was written prior to the California Supreme Court's decision for reciprocity with Rumania in *Chichernea's Estate*, 66 A.C. 74, 57 Cal. Rptr. 135, 424 P.2d 687, handed down March 8, 1967, in which the doubts of constitutionality of the statute were again expressed as quoted on p. 47 of Brief of Appellants. This is of course directly applicable to paragraph (1)(b), the second, "right to receive payment" requirement of ORS 111.070 which does indeed involve the "courts in matters of international monetary policy which may be within the exclusive province of federal authority" (57 Cal. Rptr. 150). Opposing counsel were advised by letter of this article and its omission from the bibliography at the time the Brief of Appellant was filed.

CONCLUSION.

Appellants reiterate their prayer that the decision of the Supreme Court of the State of Oregon be reversed, the Oregon reciprocity statute Section 111-.070, Oregon Revised Statutes, declared repugnant to the cited provisions of the Constitution of the United States and therefore invalid and of no effect, and the heirs of Pauline Schrader held entitled to inherit the whole of her estate, real and personal.

October 12, 1967.

Respectfully submitted,

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